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No. 90-984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KANSAS GAS AND ELECTRIC COMPANY,
Petitioner,

v.

STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS, *et al.*
Respondents.

Petition for Writ of Certiorari to the Court of Appeals of the State of Kansas

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state regulatory commission violates the Supremacy Clause, in particular, the filed rate doctrine, when in the exercise of traditional ratemaking authority, the commission imputes revenue to the sale of low-cost power when the jurisdictional utility uses the sale to justify including other, high-cost capacity in rate base.

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Respondents, State Corporation Commission of the State of Kansas (KCC), respectfully pray that the petition for writ of certiorari filed by petitioner, Kansas Gas and Electric Company (KG&E), be denied.

STATEMENT OF THE CASE

A. Introduction

The history of this case is not limited to a single administrative decision and its judicial review. The rulings in contention stem from more than five years of admin-

istrative proceedings over the serious issue of who should pay for the higher costs of a nuclear power plant. The utility ratepayers and the utility shareholders have battled over what portion of those costs each should fairly bear. In the lawful exercise of its regulatory authority, the KCC has carefully and consistently maintained an equitable sharing of these costs and benefits.

B. Facts

This case begins with KG&E's construction of the Wolf Creek Nuclear Generating Station (Wolf Creek) at a cost of more than six times the original estimate[1] and with a capacity that greatly exceeded demand. In a series of orders issued over the last five years, the KCC has attempted to soften the economic impact to KG&E's ratepayers from a full rate base treatment of Wolf Creek while simultaneously balancing the utility's need for revenue and right to an opportunity to earn a return on investment.[2] The particular KCC order at issue here, part of that sequence, was issued on February 13, 1990,[3] and addressed, *inter alia*, revenue requirement issues arising out of a KCC staff audit of KG&E's cost of service.

In November 1984, KG&E applied for a rate increase to offset an estimated test year deficiency of $373,427,835, principally caused by Wolf Creek operations. The KCC,

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[1] In 1973, the cost to construct Wolf Creek was estimated at $525 million. Completed in 1985, the ultimate cost of construction amounted to over $3 billion.

[2] This balancing process was expressly mandated in *Kansas Gas & Electric Co. v. State Corporation Commission of the State of Kansas*, 239 Kan. 483, 490, 720 P.2d 1063, 1071-1072 (1986).

[3] Petitioner's App. C at 25a.

in orders issued in the fall of 1985,[4] found a deficiency of $169.9 million and set out a schedule for phasing in rate increases to meet this deficiency.[5] The KCC also determined that Wolf Creek had 269 megawatts (MW) of excess capacity[6] which created an economic risk that had to be shared between KG&E's ratepayers and shareholders. By utilizing a risk-sharing approach and by phasing in the necessary rate increases, the KCC attempted to alleviate the adverse impact (rate shock) to ratepayers and the state economy.

These original Wolf Creek orders were modified by the KCC's Rate Stabilization Order issued March 11, 1987.[7] The importance of the Rate Stabilization Order to

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[4] The KCC orders granting KG&E's rate increases were affirmed on appeal in *Kansas Gas & Electric Co. v. State Corporation Commission of the State of Kansas*, 239 Kan. 483, 720 P.2d 1063 (1986). This Court noted probable jurisdiction of this rate treatment on February 23, 1987, in *Kansas Gas & Electric Co. v. State Corporation Commission of Kansas*, 479 U.S. 1082 (1987), but later dismissed the appeal as moot in *Kansas Gas & Electric Co. v. State Corporation Commission of Kansas*, 481 U.S. 1044 (1987).

[5] The phase-in was set out as follows:

Year	*Amount (Millions)*
1985	$135.0
1986	20.0
1987	14.6
1988	15.6 (5 years to cover deferred phase-in revenues.)

[6] Kan. Stat. Ann. (K.S.A.) 66-128c (1985) defines "excess capacity" as "any capacity in excess of the amount used and required to be used to provide adequate and reliable service to the public." Respondents' App. at 22.

[7] Petitioner's App. F at 120a. The Rate Stabilization Order allowed KG&E to delay the third scheduled increase of $14.6 million until January 1, 1989, previously approved on an interim basis in the Wolf Creek rate order and made that increase permanent. The KCC further allowed KG&E to delay the fourth increase until January 1, 1992.

this appeal is that the scheduled increases were changed from an interim basis to a permanent one. The KCC, however, left open the possibility for later challenges to the third and fourth scheduled increases.[8]

In an order handed down March 19, 1987, the KCC approved KG&E's application to retire its Ripley Steam Electric Station (Ripley) and to include an additional amount of Wolf Creek's excess capacity in KG&E's rate base as an offset to the Ripley retirement. The effect of this action was to include 46 MW of Wolf Creek (representing one-half of Ripley's 92 MW capacity) in KG&E's rate base and to establish a condition to the inclusion of the other 46 MW of Wolf Creek. The KCC added the revenue impact from the Ripley retirement[9] to the third rate increase scheduled to take effect on January 1, 1989, upon one condition. KG&E was required to demonstrate its need for more Wolf Creek capacity, "whether from peak growth or reduced overall generating capacity, . . . [had] grown by 41 MW from 1986 to 1988 so as to justify adding the incremental revenue impact to the January 1, 1989, increase."[10] The full revenue impact of the Ripley retirement brought the third increase to $29 million rather than the original $14.6 million.

[8] The KCC observed that it had the "right to re-examine all elements of KG&E's revenue requirements should it appear that its earnings or rates are unreasonably high." Petitioner's App. F at 150a. The KCC eventually eliminated the fourth increase in its Rate Modification Order issued July 15, 1988.

[9] The revenue impact from the Ripley retirement, $14.4 million, was determined according to the parameters set forth in the KCC's March 11, 1987 order. Petitioner's App. F at 134a, 135a.

[10] Petitioner's App. F at 135a. These findings were adopted and reaffirmed in the KCC order issued March 19, 1987, which approved the Ripley retirement.

The KCC scheduled a hearing for December 21, 1988, to determine whether KG&E had met the condition of a 41 MW growth in the need for Wolf Creek capacity. The Citizens' Utility Ratepayers Board (CURB), in advance of the hearing, filed a motion challenging the need for the rate increase attributable to the Ripley retirement and requesting the KCC to change this increase to an interim status, subject to refund. In its order issued December 30, 1988,[11] the KCC found that KG&E had met the 41 MW condition and allowed the inclusion of the additional Wolf Creek capacity in KG&E's rate base. Concerned with whether the resulting rate level would be an appropriate risk-sharing balance, the KCC made the corresponding $14.4 million increase interim and subject to refund[12] pending a staff investigation and audit of KG&E's rates.[13]

At the technical hearing held eleven months later in November 1989, KCC staff recommended that KG&E be

[11] Petitoner's App. E at 102a.

[12] KG&E appealed this order to the Kansas Court of Appeals which vacated, in an unpublished opinion, the aspect of the KCC's decision changing the status of the rates. *Kansas Gas & Electric Co. v. State Corporation Commission of the State of Kansas*, No. 63,400, (Kan.Ct. App. filed June 4, 1990).

[13] The KCC set out its rationale as follows: "During the past four years the Commission has attempted to achieve equitable solutions to the problems associated with bringing Wolf Creek on-line. This has necessitated a sharing of the burdens and benefits associated with Wolf Creek between KG&E and its ratepayers. The Commission is concerned with the risk-sharing aspect of KG&E's rates. In order to determine if the appropriate level of risk-sharing is reflected in rates, especially in light of actions taken by the Company since approval of the Rate Stabilization Plan, the Commission believes an audit of KG&E's rates is necessary." Petitioner's App. E at 105a-106a.

allowed to retain the Ripley portion of the rate increase and that the increase be made permanent. KG&E urged the KCC to adopt staff's recommendation. The CURB presented testimony in favor of reducing rates. The CURB argued that the KCC should re-examine the accounting treatment of KG&E's off-system sale of 41.2 MW to the Oklahoma Municipal Power Authority (OMPA). KG&E had allocated its cheapest, gas-fired capacity to the sale. The effect was to artificially imbalance the KCC's time-tested, risk-sharing strategy. The KCC found that KG&E had used the OMPA sale to meet the 41 MW condition for including Wolf Creek capacity in rate base and to obtain the accompanying $14.4 million increase. Petitioner's App. C at 58a. Accordingly, the KCC issued the February 13, 1990, order in which it decreased KG&E's revenue requirement by $13.5 million.

KG&E appealed the KCC's orders of February 13, 1990, and March 21, 1990,[14] to the Kansas Court of Appeals. One of KG&E's issues on appeal was whether the imputation of revenue to a wholesale power contract violated the Supremacy Clause of the United States Constitution.[15] The Kansas Court of Appeals held that the KCC's imputation of revenue did not affect the wholesale rates filed with the Federal Energy Regulatory Commission (FERC). The court further found the FERC's regulation of the OMPA sale and the KCC's regulation of retail rates were not the same activity and caused no conflict that would give rise to pre-emption.[16] KG&E's

[14] The KCC's order of March 21, 1990, modified the February 13, 1990, order and denied petitions for reconsideration. Petitioner's App. D at 97a.

[15] U.S. Constitution, Article VI, Clause 2.

[16] *Kansas Gas & Electric Co. v. State Corporation Commission of the State of Kansas*, No. 64,976, (Kan. Ct. App. filed June 29, 1990). Petitioner's App. A at 16a.

petition for review of this decision was denied by the Kansas Supreme Court. The KCC submits that the issue now before this Court is not worthy of the Court's attention.

SUMMARY OF THE ARGUMENT

The KCC respectfully requests that the Court deny KG&E's petition for writ of certiorari. KG&E argues at some length that the issue it places before this Court is of great national importance due to "ongoing tension" between the spheres of federal and state authority. However, the only tension that exists in this case is a continuing and shifting one between KG&E's shareholders and its ratepayers. The KCC's decision imputing Wolf Creek costs to a KG&E sale of wholesale power to the OMPA was nothing more than a matching of costs with benefits, a state retail ratemaking concept clearly preserved under the Federal Power Act.

ARGUMENT FOR DENYING THE PETITION

I. THE KCC LAWFULLY EXERCISED TRADITIONAL STATE RATEMAKING AUTHORITY.

This case presents a garden variety example of traditional state ratemaking being performed to serve the public interest. The KCC has acted consistently with the principles governing the separation of federal and state regulation of power. In its petition, KG&E has distorted the purpose and effect of the KCC's actions in an apparent effort to create a federal constitutional argument for extending the pre-emption doctrine to exclude state ratemaking authority to match costs with benefits when a jurisdictional utility sells power in a wholesale transaction. This brief will reveal the inaccuracies and fallacies with KG&E's argument and logic.

The Federal Power Act (FPA) gave the Federal Power Commission, now the FERC, the authority to regulate wholesale-level sales, while preserving the states' traditional authority over retail rate regulation. 16 U.S.C.A. § 824 (b)(1)(1985). This division between federal and state authority is referred to as the jurisdictional "bright line." *Panhandle Eastern Pipeline Co. v. Public Service Commission*, 332 U.S. 507, 517 (1947).[17] A related concept is the "filed rate doctrine" which makes the FERC's determination of a reasonable rate, in a wholesale FERC-regulated transaction, final and subject only to direct judicial review. *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951). As will be shown later, KG&E improperly applies the filed rate doctrine to this case.

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[17] Although *Panhandle Eastern* was decided under the Natural Gas Act rather than the FPA, this Court has recognized the substantial similarity between the two acts and therefore cites cases arising under both acts interchangeably. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

Congress gave the FERC specific regulatory authority over "rates and charges made, demanded, or received by any utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission." 16 U.S.C.A. § 824d(a) (1985). The FERC determines whether such rates and charges are just and reasonable and not unduly preferential, discriminatory, or disadvantageous to any party. 16 U.S.C.A. §§ 824d (1985), 824e (P.P. 1990).

In contrast to the FERC's authority, the KCC is conferred the "full power, authority and jurisdiction to supervise and control the electric public utilities . . . doing business in Kansas. . . ." Kan. Stat. Ann. (K.S.A.) 66-101 (1985). Respondents' App. at 21. The KCC's jurisdiction "shall be liberally construed" and the KCC is granted "all incidental powers necessary" to effectuate the regulation of electric public utilities. K.S.A. 66-101g (1985). Respondents' App. at 22. Kansas law further obligates the KCC to investigate all rates of electric utilities. K.S.A. 1990 Supp. 66-101d. Respondents' App. at 21. The KCC's authority includes reviewing and evaluating the "efficiency or prudence" of any actions and practices of any public utility "for the purpose of establishing fair and reasonable rates." K.S.A. 66-128a (1985). Respondents' App. at 22.

The KCC submits that its lawful exercise of statutory authority here neither is incompatible with nor erodes the FERC's exclusive jurisdiction over wholesale rates. KG&E argues the KCC's revenue adjustment imputing Wolf Creek costs to the OMPA sale somehow questions or undermines the FERC's sole power to approve wholesale power contracts. A closer look at the KCC's order reveals that the KCC never challenged any FERC determination and, in fact, limited its actions to accounting treatment only.

In March 1987, the KCC allowed KG&E to increase its third rate increase from $14.6 million to $29 million by expanding its rate base with an additional 46 MW of Wolf Creek capacity. This increase was conditioned upon KG&E showing a 41 MW peak demand growth or reduced overall generating capability. To meet this condition, KG&E chose to rely on the off-system sale of its cheaper, gas-fired capacity to the OMPA. As the KCC found in its February 13, 1990, order, the "[OMPA] sale was used as justification for including the high-cost [Wolf Creek] capacity in rates" paid by its jurisdictional, captive ratepayers. Petitioner's App. C at 58a. That finding is not in dispute.

The 46 MW of Wolf Creek capacity was not included in KG&E's rate base before the OMPA sale, because the KCC had found that capacity was "excess capacity" and not "used and required to be used." K.S.A. 66-128c (1985). Respondents' App. at 22. When it used the OMPA sale to justify including this capacity in rate base, KG&E was able to transform unneeded Wolf Creek capacity into used and useful capacity. Without the OMPA sale, this 46 MW of Wolf Creek capacity was unneeded and did not deserve rate base treatment; with the OMPA sale, this Wolf Creek capacity was useful and did deserve rate base treatment. It is important to note that the KCC did recognize the sale, never questioned the FERC determination, and included the additional Wolf Creek capacity.

KG&E's use of the OMPA sale, however, was not allowed without condition. The KCC insisted that KG&E be treated as earning revenues from the OMPA sale equal to the cost to retail ratepayers of the Wolf Creek inclusion. In placing this condition on KG&E, the KCC did no more than require the customary matching of costs and benefits associated with inclusion of capacity in rate base.

Part of the confusion in this case comes from KG&E's emphasis on inclusion of Wolf Creek **capacity** in rate base. Rate base involves not only **capacity**, but also the **costs of that capacity**. Under standard ratemaking practice, costs are included in rate base, and thus billed to the ratepayer, only if they produce a corresponding value for the ratepayer.[18] Regulators cannot permit a monopolistic utility to charge ratepayers for a cost without insisting on a corresponding benefit.

The KCC's decision has a simple and compelling logic. If the captive customers have to pay for the Wolf Creek capacity that was justified by the OMPA sale, then they are entitled to revenues associated with a Wolf Creek sale. If KG&E could not produce these revenues, the KCC must set retail rates as if KG&E had produced the revenues. Only when the revenues -- actual or imputed -- match the costs are ratepayers protected. Thus, the KCC's imputation of revenue simply equalized the ratemaking treatment to be afforded to the sale under traditional state retail ratemaking principles.

II. THE KCC'S ORDERS DO NOT VIOLATE THE FILED RATE DOCTRINE SET OUT IN *NANTAHALA* AND *MISSISSIPPI POWER AND LIGHT*.

From KG&E's standpoint, the KCC's order is preempted by the FPA and the filed rate doctrine. For support, KG&E proposes an unreasonably expansive interpretation and application of recent Supreme Court decisions. In contrast, the KCC simply argues that the filed rate doctrine is not implicated here and that its

[18] K.S.A. 66-128c (1985) makes the standard practice the law in Kansas, i.e., capacity must be "used and required to be used" for inclusion in rate base. Respondents' App. at 22.

orders pose no threat of intruding upon or otherwise eroding the FERC's authority under the FPA.

The filed rate doctrine is a judicial creation that has undergone some refinement. In *Narragansett Elec. Co v. Burke*, 119 R.I. 559, 381 A.2d 1358 (1977), *cert. denied*, 435 U.S. 972 (1978), the doctrine was interpreted to preclude the state utility commission from inquiring into the reasonableness of the FERC-approved wholesale rate and from refusing to treat the rate as other than a reasonable operating expense in the company's retail cost of service. The Supreme Court has embraced this development holding that:

> "[A] state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price . . . Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A state must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority." *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373, (1988) (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 965 (1986)).

The rationale for this rule is to ensure that sellers of wholesale power do not have their costs of paying the FERC-determined rates trapped and left unrecoverable by the state's refusal to account for these costs in setting retail rates. *Nantahala*, 476 U.S. at 970.

KG&E asserts that the imputation of Wolf Creek costs to the OMPA sale results in "trapped costs" signaling a violation of the filed rate doctrine. KG&E.'s alleged "trapped costs" are the weak link to its pre-emption arguments

because these purported costs are unlike anything found in this Court's prior decisions. In *Nantahala*, the utility lost its chance to recover the cost of purchasing power at FERC-set rates because the state commission, in setting retail rates, imputed to the utility a lower average cost of power. *Id.* at 970. In *Mississippi Power*, the utility's cost in purchasing a FERC-allocated portion of nuclear-generated power would have been trapped if the state commission, after conducting its prudence review, had concluded the cost should not be passed on to the ratepayers. In both cases, the state's action directly prevented the utility from recovering its FERC-determined costs through its retail rate charges. In contrast, KG&E has neither shown nor argued that its FERC-set costs from the OMPA sale were lost as a result of the KCC's imputation.

The KCC order does not preclude KG&E or the OMPA from recovering their respective costs of paying the FERC-approved OMPA rate. To illustrate, FERC set the rate for the sale of power from KG&E as seller to the OMPA as wholesaler-as-buyer. Any retail sales occurring as a result of this transaction would presumably take place in Oklahoma with the OMPA's ratepayers. It is the regulation of this sale, the sale from the OMPA to the ultimate Oklahoma consumer, which could come under consideration for violating the filed rate doctrine. In other words, Oklahoma could not exercise its jurisdiction over retail sales to prevent the OMPA from recovering the costs of paying the FERC-approved rate to KG&E.

KG&E badly misconstrues the concept of "trapped costs." In footnote 17 at page 19 of its petition, KG&E states that, "trapped costs occur when state regulators set retail rates that prohibit full recovery of the revenue requirement generated by FERC-approved wholesale ar-

rangements." KG&E wants to transform its entire revenue requirement into a FERC determination because some FERC-imposed costs had been calculated into the revenue requirement. Such reasoning would obliterate any role of state regulation of local sales of power and frustrate the intent behind the FPA. The KCC's actions were well within its jurisdiction. The KCC sought to mitigate the economic impact to ratepayers when more Wolf Creek capacity was added to KG&E's rate base. By imputing revenue, the KCC was able to reduce KG&E's revenue requirement and thereby its retail rates. The KCC was only exercising its proper authority in balancing burdens and benefits between shareholders and ratepayers.

Both *Nantahala* and *Mississippi Power* involved the trapping of **FERC-imposed** costs. KG&E contends the KCC prevented it "from recovering these Wolf Creek costs by pretending that FERC had allowed them to be charged to OMPA." Petition, p. 19 n. 17. The FERC's approval of the OMPA sale did not entail any corresponding determination or allocation of KG&E's cost of Wolf Creek power. KG&E sold to the OMPA its cheaper, gas-fired power, not its more expensive, nuclear-generated power from Wolf Creek. The FERC, therefore, had no reason to evaluate or approve KG&E's costs in Wolf Creek. Unlike *Nantahala* and *Mississippi Power*, the state's action here does not result in any trapping of **FERC-determined** costs.

A final significant distinction is that in both *Nantahala* and *Mississippi Power*, the "trapping" took place because the FERC approved the reasonableness and price of a wholesale transaction, but the state regulators second-guessed the FERC decision. The buying utility, an affiliated interest of the seller, had no legal mind of its own, yet the state commission treated the purchasing

utility as having the ability to shop for alternative power. Here, no agency obligated KG&E to sell to the OMPA. KG&E's decision to sell was purely **voluntary.** The "trapped cost" argument does not apply, for the simple reason that there is no "trap."

In forcing the application of the filed rate doctrine, KG&E blurs the distinctions between this case and the cases of *Nantahala* and *Mississippi Power* in which this Court carefully delineated trapped cost analysis. KG&E's argument that it lost FERC-determined costs has a fictitious premise. If KG&E had sold power generated at Wolf Creek in its wholesale sale to the OMPA, then the FERC presumably would have determined a reasonable rate of recovery on KG&E's cost of generating that power. Because the KCC imputed the costs of Wolf Creek power to the OMPA sale, KG&E believes it was improperly denied both a **FERC determination** of those generating costs and **recovery** of them. In other words, KG&E's argument of trapped costs is based on imputing actions to the FERC. KG&E did not sell Wolf Creek power to the OMPA and the FERC had no reason to consider KG&E's costs in generating such power. Simply stated, KG&E has suffered no trapped costs due to existing, inconsistent orders from the FERC and the KCC.

The Kansas Court of Appeals relied upon another distinction. The Supreme Court in *Nantahala* and *Mississippi Power* applied the filed rate doctrine to protect a buyer of wholesale power. Indeed, the Court said: "The filed rate doctrine ensures that sellers of wholesale power, governed by FERC, can recover the costs incurred by their payment of just and reasonable FERC-set rates." *Nantahala*, 476 U.S. at 970. In the instant case, KG&E is not a buyer of wholesale power at FERC-set rates, but the seller. The Kansas Court of Appeals read both *Nantahala* and *Mississippi Power* as "not address[ing] the

effect of state regulation on the seller of the wholesale power that recovers the FERC-filed rate."[19] KG&E distorts this plain reading of Supreme Court precedent in arguing that the Kansas court rejected the FERC's exclusive jurisdiction over sellers in a wholesale power transaction. The KCC proposes the buyer-seller distinction is viable in this case primarily because KG&E, as the seller, is unable to prove that any FERC-determined cost was trapped as a result of the KCC's action.

At page 25 of its petition, KG&E wrongly asserts that the Kansas Court of Appeals engaged in case-by-case analysis to avoid finding pre-emption and thus ignored the intent of Congress to establish a mechanical bright line test for distinguishing between federal and state jurisidiction.[20] On the contrary, the Kansas court applied the bright line test to determine that KG&E's OMPA sale was a wholesale transaction subject to the FERC's jurisdiction. Once the court made this determination, its responsibility then shifted to determining whether the KCC properly treated the OMPA sale under the filed rate doctrine. The Kansas court fully recognized that the filed rate doctrine prohibits a state from impermissibly interfering with the scheme of federal regulation. However, a determination of interference under the filed rate doctrine necessarily entails some factual analysis which does not conflict with Congressional intent. KG&E ignores the fact that the filed rate doctrine, though related to the bright line jurisdictional test, is a distinct legal concept. The Kansas Court of Appeals properly applied the filed rate doctrine and found the KCC's actions were not preempted. The KCC properly exercised its authority in

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[19] Petitioner's App. A at 18a.

[20] This Court enunciated Congress' intent in *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498 (1942).

balancing burdens and benefits between shareholders and ratepayers, a traditional and time-tested state authority that this Court has never held pre-empted when the transaction is tangentially touched by the FERC.

III. THE QUESTION PRESENTED CARRIES NO NATIONAL IMPORTANCE

This case presents a classic example of a state utility commission exercising its customary ratemaking power to achieve an equitable result for the regulated utility and the ratepaying public. Of its own volition, KG&E made an off-system sale of low-cost, gas-fired power and then used that sale to justify including additional high-cost, nuclear-generated power in its rate base. The KCC was faced with the problem of determining the propriety and value of including the added Wolf Creek capacity into KG&E's rate base. The additional Wolf Creek capacity **was included**, but the OMPA sale of low-cost, gas-fired power did not justify inclusion of the nuclear capacity at full cost. The KCC imputed revenue to obtain the traditional matching of costs and benefits, a perfectly appropriate and justified state ratemaking technique. The KCC did not refuse to accept any FERC-filed rate. KG&E suffered no trapped costs. Accusations of parochialism and protectionism cannot elevate a simple ratemaking decision to a federal constitutional question. The KCC acted fully within the powers preserved to it by the FPA. This case has no national importance.

CONCLUSION

KG&E's petition for writ of certiorari does not raise a substantial federal question. At issue in this appeal are administrative orders pertaining to the regulation of retail rates, a traditional state function. The KCC's orders do not impinge upon federal authority nor do they present an issue of national importance. KG&E's petition should be denied and the state court's decision affirmed in all respects.

Respectfully submitted,

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APPENDIX

66-101. Electric public utilities; power, authority and jurisdiction of state corporation commission. The commission is given full power, authority and jurisdiction to supervise and control the electric public utilities, as defined in K.S.A. 66-101a, doing business in Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.

History: R.S. 1923, 66-101; L. 1969, ch. 302 § 2; L. 1981, ch. 255, § 1; L. 1985, ch. 224, § 1; L. 1985, ch. 225, § 7; July 1.

66-101d. Same; investigation of rates, tolls, charges and services; orders of commission; hearing. It shall be the duty of the commission, either upon complaint or upon its own initiative, to investigate all rates, joint rates, tolls, charges and exactions, classifications or schedules of rates or joint rates and rules and regulations of electric public utilities. If after hearing and investigation the commission finds that such rates, joint rates, tolls, charges or exactions, classifications or schedules of rates or joint rates or rules and regulations are unjust, unreasonable, unjustly discriminatory or unduly preferential, the commission shall have the power to fix and order substituted therefor such rates, tolls, charges, exactions, classifications or schedules of rates or joint rates and such rules and regulations as are just and reasonable.

If upon any investigation it is found that any regulation, measurement, practice, act or service complained of is unjust, unreasonable, unreasonably inefficient or insufficient, unduly preferential, unjustly discriminatory, or otherwise in violation of this act or of the orders of the commission, or if it is found that any service is inadequate or that any reasonable service cannot be obtained, the commission shall have the power to substitute therefor such other regulations, measurements, practices, service or acts, and to make such order respecting any such changes in such regulations, measurements, practices, service or acts as are just and reasonable. When, in the judgment of the commission, public necessity and convenience require, the commission shall have the power to establish just and reasonable concentration or other special rates, charges or privileges, but all such rates, charges and privileges shall be open to all users of a like kind of service under similar circumstances and conditions.

Hearings shall be conducted in accordance with the provisions of the Kansas administrative procedure act.

History: L. 1911, ch. 238, § 13; R.S. 1923, 66-110; L. 1985, ch. 225, § 25; L. 1988, ch. 356, § 220; July 1, 1989.

66-101g. Same; liberal construction; incidental powers granted. As applied to regulation of electric public utilities, the provisions of this act and all grants of power, authority and jurisdiction herein made to the commission, shall be liberally construed, and all incidental powers necessary to carry into effect the provisions of this act are expressly granted to and conferred upon the commission.

History: L. 1911, ch. 238, § 41; R.S. 1923, 66-141; L. 1985, ch. 225, § 43; July 1.

66-128a. Fixing rates, joint rates, tolls and averages; authority of commission not limited by 66-128b through 66-128i. Nothing in K.S.A. 66-128b to 66-128i, inclusive, shall be construed to limit the authority of the state corporation commission to review and evaluate the efficiency or prudence of any actions, including acquisition of excess capacity, or operating practices of any public utility or common carrier for the purpose of establishing fair and reasonable rates, joint rates, tolls and charges.

History: L. 1984, ch. 247, § 2; April 19.

66-128c. Valuation of property for rate making; evaluation of efficiency or prudence of utility; exclusion of all or a portion of costs of excess capacity, when; "excess capacity" defined; exclusion or reduction of return on costs from excess capacity. The state corporation commission, in determining the reasonable value of property under K.S.A. 66-128, and amendments thereto, shall have the power to evaluate the efficiency or prudence of acquisition, construction or operating practices of that utility. In the event the state corporation commission determines that a portion of the costs of acquisiton, construction or operation were incurred due in whole or in part to a lack of efficiency or prudence, or were incurred in the acquisition or construction of excess capacity, it shall have the power and authority to exclude all or a portion of those costs from the revenue requested by the utility.

For the purpose of this act, "excess capacity" means any capacity in excess of the amount used and required to be used to provide adequate and reliable service to the public within the state of Kansas as determined by the commission. The commission may in its discretion prohibit or reduce the return on costs which were incurred in constructing, maintaining or operating excess capacity.

History: L. 1984, ch. 247, § 4; April 19.